CLERK'S COPY.

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 193

CHICAGO & NORTHWESTERN RAILWAY COMPANY, A CORPORATION,

vs.

O. N. LINDELL

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JUNE 24, 1929

(34,324)

(34,324)

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[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 5778

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

O. N. LINDELL, Appellee

Upon Appeal from the United States District Court for the Southern District of California, Northern Division

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit under Section 239 of the Judicial Code

For the proper decision of the above entitled cause pending on appeal and duly submitted for consideration, instructions are respectfully requested of the Supreme Court on the following important, if not controlling, question of law, concerning which we are in doubt:

QUESTION CERTIFIED

Question. Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful [fol. 2] charges and thereafter brings an action at law to recover from the shipper the amount thereof, in a United States court in a district where the state law provides that if a defendant omits to set up a counterclaim arising out of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same, and, further, that where such cross-claims have existed "the two demands shall be deemed compensated," is the shipper, acting in good faith and without collusion, debarred by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587) from pleading, by way of setoff, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment?

The question arises in this way:

From the pleadings and the stipulation of facts it appears that on October 17, 1925, appellee delivered to the Southern Pacific (railroad) Company at Kingsburg, California, a shipment of grapes to be transported to Chicago and there delivered to a designated consignee. Without the collection of the freight and other proper charges aggregating $683.79, from either the shipper or the consignee, the consignment was so carried and delivered, the service from Omaha to destination being rendered by the appellant company. Because of unreasonable delay on the part of appellant in moving the grapes and its failure to use reasonable care in keeping them properly iced, they were delivered in a damaged condition, to appellee's loss in an amount equal to or in excess of $683.79. No part of either the claim for freight or the claim for damages having been paid, appellant, on May 7, 1928, commenced this action in the United [fol. 3] States District Court for the Southern District of California to recover the amount of the freight charges, and, answering, the shipper, besides denying certain of the averments of the complaint, affirmatively set up as a defense his loss from failure to ice and to transport with reasonable dispatch, which he claimed to be $1,011.70. He asked for no affirmative relief but only that the amount be held to be a setoff in satisfaction of appellant's claim. The court below entertained and allowed such setoff, and the plaintiff appeals.

Where, under facts generally analogous, the precise question has been considered the decisions are apparently in irreconcilable conflict. The following would seem to answer it in the affirmative: I. C. R. Co. v. Hoopes, 233 Fed. 135; C. & N. W. Ry. Co. v. Stein, 233 Fed. 716; Johnson-Brown Co. v. Railroad, 239 Fed. 590; Penn. R. Co. v. South Carolina, etc., 25 Fed. (2d) 315; D., L. & W. R. v. Nuhs Co., 93 N. J. Law 309, 111 Atl. 223; Adams Express Co. v. Albright Bros., 75 Pa. Super. Ct. 410.

And the following, in the negative: Wells Fargo & Co. v. Cuneo, 241 Fed. 727; C. & N. W. Ry. Co. v. Tecktonius Mfg. Co., 262 Fed. 715; Payne v. Clarke, 271 Fed. 525; C. M. & St. P. Ry. Co. v. Pioneer Grain Corp., 26 Fed (2d) 90;

Battle v. Atkinson, 9 Ga. App. 488, 71 S. E. 775; Central, etc., v. Birmingham, etc., Ala. App. 419, 64 So. 202; Nashville, etc., v. Tennessee Mill Co., 143 Tenn. 237, 227 S. W. 443; Penn. R. Co. v. Bellinger, 101 Misc. Rep. 105, 166 N. Y. S. 652; N. Y. Cent. R. Co. v. Federal Sugar, etc., 201 App. Div. 467, 194 N. Y. S. 467.

Dated June 13, 1929.

Frank H. Rudkin, Frank S. Dietrich, Curtis D. Wilbur, Circuit Judges, Ninth Circuit.

Clerk's certificate to foregoing paper omitted in printing.

Endorsed on cover: File No. 34,324. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 193. Chicago & Northwestern Railway Company, a corporation, vs. O. N. Lindell. (Certificate.) Filed June 24th, 1929. File No. 34,324.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 193.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant,

v.

O. N. LINDELL, Appellee.

On Certificate of the Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANT.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 193.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant,

v.

O. N. LINDELL, Appellee.

On Certificate of the Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANT.

This case comes to this Court under Section 239 of the Judicial Code as amended (U. S. Code, Title 28, Section 346), and involves the question whether, in an action by a carrier against a shipper to collect its charges, the shipper can interpose a counterclaim based upon the carrier's failure to perform its obligations with reference to the identical shipment on which the unpaid charges are based.

STATEMENT SHOWING JURISDICTION IN THIS COURT.

From the statement of facts in the certificate of the Circuit Court of Appeals it appears that this was an action brought in the District Court of the United States for the Southern District of California by a common carrier against a shipper for the collection of six hundred eighty-three dollars and seventy-nine cents ($683.79), of freight and other charges, in connection with the transportation of a shipment of grapes from Kingsburg, California, to Chicago. The shipper set up as a defense his loss from failure to ice and transport with reasonable dispatch in connection with the same shipment, which he claimed to be one thousand eleven dollars and seventy cents ($1,011.70). The shipper did not ask for affirmative relief, but that his loss be held to be a set-off in satisfaction of the carrier's claim for freight charges. The District Court allowed the set-off and the plaintiff appealed to the Circuit Court of Appeals. That Court has, in the certificate herein, requested of this Court instruction on the question of law involved concerning which that Court is in doubt. The question certified upon which the Circuit Court of Appeals requests instruction is as follows:

> "Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful charges, and thereafter brings an action at law to recover from the shipper the amount thereof, in a United

States court in a district where the state law provides that if a defendant omits to set up a counterclaim arising out of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same; and, further, that where such cross claims have existed 'the two demands shall be deemed compensated,' is the shipper, acting in good faith and without collusion, debarred by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587), from pleading, by way of set-off, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment?"

The jurisdiction of this Court to answer the question herein certified to it is conferred by Section 239 of the Judicial Code as amended (U. S. Code, Title 28, Section 346).

OUTLINE OF ARGUMENT.

May a shipper, when sued by a carrier for its charges, plead a counterclaim for loss and damage? The authorities are divided. Decisions of federal district courts holding this may not be done are: *Illinois Central R. R. v. William L. Hoopes & Sons,* 233 Fed. 135; *Chicago and North Western Ry. Co. v. William S. Stein,* 233 Fed. 716; *Johnson-Brown Co. v. Delaware, L. & W. R. R. Co.,* 239 Fed. 590; *Pennsylvania R. R. v. South Carolina Produce Ass'n,* 25 Fed. (2nd) 315. Decisions of federal district courts to the contrary are: *Wells Fargo Co. v. Cuneo,* 241 Fed. 727; *Chicago and North Western Ry. Co. v. E. C. Tectonius Manufacturing Co.,* 262 Fed. 715; *Payne v. Clarke,* 271 Fed. 525; *Chicago, M. & St. P. Ry. Co. v. Pioneer Grain Corp.,* 26 Fed. (2nd) 90.

Decisions of state courts denying the right to counterclaim are: *Delaware, L. & W. R. R. Co. v. Henry Nuhs,* 93 N. J. Law 309, 111 Atl. 223; *Bush v. Keystone Driller Co.,* 199 S. W. 597; *Adams Express Co. v. Albright Bros.,* 75 Pa. Sup. Ct. 410. Decisions of state courts permitting counterclaims are: *New York Central R. R. v. Federal Sugar Refining Co.,* 201 App. Div. 467, 194 N. Y. Supp. 467, reversed on other grounds, 235 N. Y. 182, 139 N. E. 234, 26 A. L. R. 1312; *Pennsylvania R. R. v. Bellinger,* 101 N. Y. Misc. Rep. 105, 166 N. Y. Supp. 652; *Battle v. Atkinson,* 9 Ga. App. 488, 71 S. E. 775, and 11 Ga. App. 837, 76 S. E. 597; *N. C. & St. L. Ry. v. Tennessee Mill Co.,* 143 Tenn.

237, 227 S. W. 443; *Central of Geo. Ry. Co. v. Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 So. 202.

Under the Hepburn Act a carrier must collect its charges only in money. It may not collect a greater or less *or different* compensation than the rates, etc., specified in its tariffs (*Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467). A carrier may not accept a release of damages in payment of transportation charges (*Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680). Nor any medium other than cash (*N. Y. Central R. R. v. Gray*, 239 U. S. 583; *State v. Union Pacific R. R. Co.*, 87 Neb. 29, 126 N. W. 859, 31 L. R. A. [n. s.] 657).

This principle precludes payment of a carrier's charges by offsetting claims against them, whether in or out of court. And the provisions of the California Code with reference to pleading counterclaims are immaterial, since this is a federal question and a state practice in conflict with federal law cannot prevail (*Jewell Car Co. v. Kirkpatrick Construction Co.*, 107 Fed. 622; *Sligo Furnace Co. v. Dalton*, 255 Fed. 532; *U. S. v. Robson*, 34 U. S. [9 Pet.] 319; *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194; *Luxton v. North River Bridge Co.*, 147 U. S. 337; *Poindexter v. Greenhow*, 114 U. S. 270).

No contract, however fair, can be permitted under which the carrier's charges are paid in anything other than money. Cases such as *Battle v. Atkinson*, 9 Ga. App. 488, 71 S. E. 775, are unsound and cannot be reconciled with the

views of this Court expressed in *Chicago I. & L. Ry. Co. v. U. S.*, 219 U. S. 486.

The possibility of collusion is not the only reason for denying shippers this right. Collusion is not necessary to sustain a prosecution for rebating (*U. S. v. Koenig Coal Co.*, 270 U. S. 512). If shippers may plead counterclaims, the difficulty of collecting undercharges will be greatly increased, especially where amounts are small; and as a practical matter the policy of the law will be defeated, even if there is no collusion.

The Transportation Act of 1920 (U. S. Code, Title 49, Section 3, Subsection 2) prohibits the delivery of freight until tariff charges have been paid, except under such rules and regulations as the Commission may prescribe to insure prompt payment of rates and charges and prevent unjust discrimination. The Commission has permitted extensions of credit in some cases not exceeding ninety-six hours (*In re Section 3 of the Interstate Commerce Act as amended by Section 405 of the Transportation Act of 1920*, 57 I. C. C. 591). The assertion by a shipper of the right to counterclaim is inconsistent with this section of the Transportation Act and with the regulations of the Commission under this act. For a shipper to be allowed to assert a counterclaim in such cases will have the effect of enabling a shipper indefinitely to postpone the collection of the carrier's charges.

ARGUMENT.

Review of Conflicting Authorities.

This case presents squarely a question of importance to all railroads engaged in interstate commerce, and one which has heretofore been uncertain and the subject of divergent views on the part of such courts as have had occasion to pass upon it.

The first reported decision in which the point was passed upon by any court appears to have been the case of *Illinois Central R. R. Co. v. William L. Hoopes & Sons*, 233 Fed. 135, in which District Judge Wade of the District Court of Iowa, Davenport Division, held upon the authority of *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, and *Chicago, Indianapolis and Louisville Ry. Co. v. U. S.*, 219 U. S. 486, that a railway company cannot accept any compensation other than cash for interstate transportation; that to permit a shipper to counterclaim when sued for the collection of freight charges would, in effect, open the door to the granting and receiving of rebates; and that it was against public policy to permit a counterclaim of this kind to be pleaded. In the same volume of the Federal Reporter, at page 716, appears the case of *Chicago and North Western Ry. Co. v. William S. Stein*, in which case District Judge Munger of the District Court for the District of Nebraska, Lincoln Division, reached a like conclusion upon the authority of the same two decisions of this Court, and held that as carriers cannot accept anything but cash in payment for transportation, and as no contract, however fair, looking to the pay-

ment for such services by any exchange of commodities can stand, the public policy evinced by the law required the denial of the right to set off, leaving the shipper to enforce by independent action any rights he might have.

The *Hoopes* case was cited with approval upon another point by the Circuit Court of Appeals for the Fourth Circuit in *Lake and Export Coal Corporation v. Chesapeake & Ohio R. R.*, 1 Fed. (2nd) 968.

The case of *Johnson-Brown Co. v. Delaware, Lackawanna & Western R. R.*, 239 Fed. 590, was one in which the shipper attempted, in equity, to compel an equitable set-off against a carrier's charges of a claim for damages to goods shipped. The Court erroneously held that under the Carmack Amendment only the initial carrier might be sued, and, with reference to the point here involved, held, on the authority of the *Stein Co.* and *Hoopes* cases, *supra*, that, as freight could only be paid in cash, set-offs would open the door to fraud and discrimination.

Upon the authority of these three cases, a like result was reached in *Delaware, Lackawanna & Western R. R. Co. v. Henry Nuhs*, 93 N. J. Law 309, 111 Atl. 223, and in *Bush v. Keystone Driller Co.*, 199 S. W. 597, appears a dictum to the same effect, based on the authority of the *Hoopes* and *Stein Co.* cases. To the same effect also is the case of *Adams Express Co. v. Albright Brothers*, 75 Pa. Sup. Ct. 410. In *New York, Susquehanna and Western R. R. v. Ruthven*, 88 Pa. Sup. Ct. 501, the question was referred to and the conflicting decisions cited, but the Court expressly declined to go into the question and de-

cided the case upon another point rendering it unnecessary to pass upon this question.

In *Pennsylvania R. R. v. South Carolina Produce Association*, 25 Fed. (2nd) 315, decided by the United States District Court for the Eastern District of South Carolina, it was held that a shipper sued for freight charges could not plead a set-off or counterclaim upon the ground that it was unlawful for a railroad to accept in payment of its charges a release of a claim for damages, or to collect its freight charges in something other than money, and that this could no more be done in court than out of court.

On the other hand, Judge Mayer, in the District Court for the Southern District of New York, in *Wells Fargo Co. v. Cuneo*, 241 Fed. 727, declined to follow the *Stein Co.* and *Hoopes* cases and held that in such actions set-offs and counterclaims were pleadable. He referred to the policy of the law to settle germane disputes in one litigation and concluded that two actions should not be required where the controversy could be disposed of in one. It may be remarked, in passing, that in this *Cuneo* case the Court erroneously assumed that the mere fact that delivery of goods for shipment imports, under the Interstate Commerce Act, as a matter of law, an absolute promise to pay freight charges, and that an agreement to the contrary was void. This was pointed out by this Court in a note appended to the case of *Louisville & Nashville R. R. v. Central Iron Co.*, 265 U. S. 59, at page 69; so that, upon this other point, the *Cuneo* case has been disapproved by this Court.

In *Chicago and North Western Ry. Co. v. E. C. Tectonius Manufacturing Co.*, 262 Fed. 715, Judge Geiger of

the Eastern District of Wisconsin, after referring to the conflict of authority, held that to permit a shipper, upon being sued for freight charges, to counterclaim or set off a claim for damages, did not violate the principle of the *Mottley* case. To the same effect also is the case of *Payne v. Clark*, 271 Fed. 525, a decision by Judge Bledsoe of the District Court for the Southern District of California, Southern Division. In the latter case the Court was evidently influenced by the provisions of Section 439 of the Code of Civil Procedure of California, which provides:

> "If the defendant omits to set up a counterclaim upon a cause of action arising out of the transaction set forth in the complaint as a foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor";

also by Section 440 of the California Code, which provides:

> "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

In *New York Central R. R. v. Federal Sugar Refining Co.*, 201 App. Div. 467, 194 N. Y. Supp. 467, the New York Appellate Division was of the opinion, upon the authority of the three cases last cited above, that a counterclaim might be pleaded. This case was, however, reversed by

the New York Court of Appeals upon another point in an opinion which did not refer to the question whether a counterclaim might be pleaded (*New York Central R. R. v. Federal Sugar Refining Co.*, 235 N. Y. 182, 139 N. E. 234, 26 A. L. R. 1312).

In *Pennsylvania R. R. v. Bellinger*, 101 N. Y. Misc. Rep. 105, 166 N. Y. Supp. 652, a New York lower court at *nisi prius*, cited and declined to follow the *Stein Company* and *Hoopes* cases, and held that in such an action a counterclaim might be pleaded under the authority of Section 501 of the New York Code of Civil Procedure, and referred to the argument to the contrary set out in these cases as "the theoretical objection set forth in the above-mentioned federal cases." This New York Court cited and followed the cases of *Battle v. Atkinson*, 9 Ga. App. 488, 71 S. E. 775, and 11 Ga. App. 837, 76 S. E. 597, in which the Georgia Court, although referring to the *Mottley* case and cases to the same effect, held, without referring to any authorities on the precise point here involved, that there was nothing in the law to forbid recoupment or set-off in such cases.

The Supreme Court of Tennessee, in *N. C. & St. L. Ry. v. Tennessee Mill Co.*, 143 Tenn. 237, 227 S. W. 443, said that it preferred to follow the cases permitting a defendant to plead such a counterclaim, "there being no decisions in the higher federal courts."

In *Central of Georgia Ry. v. Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 So. 202, there is a dictum in which the Court refers to the provision of the Alabama Code pro-

viding for set-off of mutual debts, whether liquidated or unliquidated, and then says that the Court knows of no reason why such a set-off should not be as available to a shipper when sued by a carrier for freight charges as when sued by it for any other debt or demand; but this Alabama Court adds the qualification that such suit be of such character as is cognizable before the state courts and not one cognizable only before the United States courts or the Interstate Commerce Commission.

The most recent case on the subject is that of *Chicago, M. & St. P. Ry. Co. v. Pioneer Grain Corp.*, 26 Fed. (2nd) 90, in which Judge John Sanborn of the District Court of the District of Minnesota, Fourth Division, permitted a counterclaim to be pleaded in such an action, saying that, at best, the question was a very doubtful one, and that if, after trial on the merits, the defendant should prevail with respect to the counterclaim this question could be finally settled on appeal.

UNDER THE HEPBURN ACT A CARRIER MUST COLLECT ITS CHARGES ONLY IN MONEY.

In *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, *supra*, this Court had occasion to construe the clause in the statute which prohibits any carrier subject to the act from demanding, collecting or receiving "a greater or less or different compensation" than the rates, fares and charges specified in the tariff. This Court in that case held that a carrier might not issue an annual pass to one not within the excepted classes, although prior to the passage of the Interstate Commerce Act the carrier had made a

settlement, lawful at the time when made, of a claim for personal injuries under which, in consideration of a release of the claim, the carrier contracted to issue an annual pass each year to the injured claimant during the latter's lifetime. This Court, after pointing out that the words "or different" could not be regarded as superfluous or meaningless, said, among other things (at p. 476):

> "In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation 'different' *in kind* from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way without producing the utmost confusion and defeating the policy established by the acts regulating commerce."

In *Union Pacific Ry. v. Goodridge,* 149 U. S. 680, the action was for triple damages under a statute of Colorado for alleged unjust discrimination in freight rates on coal. One of the defenses was that the shipper who was alleged to have received a rebate had had a claim against the Railway Company for unliquidated damages due to the Railway Company's negligence in breaking into a coal mine and setting it on fire, and it was contended that the alleged rebate was in consideration of the release of this claim. This Court said of this defense (at p. 691):

"To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road who has received a personal injury from making a claim against the road for any amount he chooses, and, in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported."

Railroad charges may not be paid in anything but money; they may not be paid in property or services; they may not be paid by releasing damage claims against the carrier, or any medium other than cash. (See *N. Y. Central R. R. v. Gray*, 239 U. S. 583; *State v. Union Pacific R. R. Co.*, 87 Neb. 29, 126 N. W. 859, 31 L. R. A. [n. s.] 657.)

THE ABOVE PRINCIPLE PRECLUDES PAYMENT OF THE CARRIER'S CHARGES BY OFFSETTING CLAIMS AGAINST THEM, WHETHER IN OR OUT OF COURT.

It would scarcely be contended that out of court a shipper could offset a demand for an undercharge with a claim for damages. Indeed, this is inferentially recognized in

the *Cuneo* and *Tectonius* cases, *supra*. In the *Cuneo* case the Court said (241 Fed. 727, at p. 730):

> "It may well be that the parties cannot compromise out of court, but I need not pass on that question."

In the *Tectonius* case the Court intimated that no compromise could be permitted. Yet the Court there permitted the defendant to plead a set-off and counterclaim, the effect of which was to bring about in court the payment of the carrier's charges in something else than money, viz., the offsetting against such charges of a claim for loss and damages to freight. The result was, therefore, that what was forbidden outside of court was permitted in court.

Upon sound principle, the rule that a carrier's charges must be paid only in money extends to the assertion in court of the right to pay such charges by offsetting a counterclaim against them. As pointed out by Judge Munger in the *Stein* case, *supra*, if such set-off is permitted the Court must prevent the usual right to make compromises of such suits and undertake "the impossible task" of holding the carrier to diligence and good faith in presenting its defense to such counterclaim. Even in the contrary case of *Payne v. Clark*, 271 Fed. 525, *supra*, in which the shipper was allowed to plead a counterclaim, Judge Bledsoe recognized that in order that the public policy involved might be best maintained, "the trial court would be unusually astute to see that every item of dam-

age claimed was bottomed upon persuasive proof." And in the case of *Pennsylvania R. R. Co. v. Bellinger,* 101 N. Y. Misc. Rep. 105, 166 N. Y. Supp. 652, *supra,* the Court said that,

> "in order to prevent a possible discrimination or rebating, it may be incumbent upon the courts to see to it that the action is properly prosecuted to judgment."

The case at bar comes up from the same district as that in which the case of *Payne v. Clark, supra,* was heard. The fact that, in each case, if a federal question were not involved, the California Code would bar the defendant from the assertion of a claim not pleaded by way of set-off or counterclaim has, of course, no bearing, since it is well settled that the Conformity Act does not extend to the application of a rule of state practice which is in conflict with federal law (*Jewell Car Co. v. Kirkpatrick Construction Co.,* 107 Fed. 622; *Sligo Furnace Co. v. Dalton,* 255 Fed. 532; *U. S. v. Robson,* 34 U. S. [9 Pet.] 319; *Mexican Central Ry. Co. v. Pinkney,* 149 U. S. 194; *Luxton v. North River Bridge Co.,* 147 U. S. 337; *Poindexter v. Greenhow,* 114 U. S. 270).

Even the cases holding that counterclaims may be pleaded recognize that compromises of such claims for damages so pleaded probably should not be permitted; that out of court shippers may not pay their freight charges with damage claims, and that where such counterclaims

are pleaded the Court must take it upon itself to see that they are defended in good faith. The problem is soundly analyzed and discussed by Judge Wade in the *Hoopes* case (233 Fed. 135, at p. 136):

> "I am in full accord with these views expressed by Judge Munger. It is the duty of the carrier to collect all freight charges and, where necessary, to commence actions to enforce payment. To perform this duty it is necessary that the carrier shall commence action in the district where the shipper resides. Carriers are often compelled to maintain actions in districts, and even in states, far removed from the district in which suits could be maintained against them. Very often the suits are for small amounts, and if the shipper can, by counterclaim, acquire jurisdiction of the carrier in an action for damages to freight, he can force the carrier to spend much more in prosecuting its action for freight charges than the freight charges amount to.
>
> "A few years ago the nation was startled when it was found that favorite shippers were getting rich upon the rebates granted by carriers. One of the devices used in granting such rebates was for the shipper to make a fictitious claim for damages to freight, which was promptly allowed. To permit counterclaims in these actions for freight charges would simply open the door to a renewal of this method of rebate; at least, it would cast suspicion upon the transactions—especially in every case where a compromise was effected. Compromises are favored in law. If the defendant in this action has a valid claim for damages, both parties should be permitted to exercise their right to compromise the action, but,

if such compromise were effected in a transaction involving the collection of freight charges, the Court would be compelled to supervise it with the utmost care, in order, as Judge Munger expresses it, 'to prevent the granting and receiving of rebates by insidious agreement between the parties.'

"So important is it that the collection of freight charges should be uniform as to all shippers, so important is it that it be above suspicion of favoritism, that I feel that it is against public policy to permit a counterclaim of this kind to be pleaded, and the counterclaim will be stricken out."

The case against allowing counterclaims to be pleaded in this class of actions is also well stated in *Pennsylvania R. R. Co. v. S. Car. Produce Co.*, 25 Fed. (2nd) 315, *supra*, wherein the Court, after pointing out that the decisions were in irreconcilable conflict, said that the principles laid down by this Court furnish a sufficient and logical guide by which to reach a correct solution of the question; and after citing the *Mottley* case and the case of *Chicago, Indianapolis and Louisville Ry. Co. v. U. S.*, 219 U. S. 486 (wherein it was held that, even though the money value of the transportation furnished was equal to the advertising furnished, the railroad was not authorized to accept as compensation anything but money for its charges and so could not issue transportation in exchange for advertising), the Court reasoned from these decisions that no counterclaim or set-off was permissible, saying (25 Fed. [2nd] 315, at 317):

"The policy of the act of Congress in question is, as has been stated by the Supreme Court, to prevent discrimination and to cut up, root and branch, the practice of discriminating by means of rebates and allowances of claims for damages. It is clear, under these decisions, that, in order to effect that purpose, a railroad company is bound to collect its freight charges in money only, and cannot lawfully, in collecting such charges, allow a claim for damages as a set-off. If a railroad accepts in payment of these charges, either in whole or in part, a release of a claim for damages, it certainly, under the decisions of the Supreme Court, has not collected its charges in money only, and this is especially true where the claim is for unliquidated damages, as in the case at bar. The two transactions must be treated absolutely as independent and separate transactions, in order to effectuate the purpose of the act. To allow the railroad company to offset these claims for damages would be opening the door to the very practices which it was the intention of Congress to prevent.

"This much, it seems to me, is clear and settled. Now, can the parties, by setting up the claim for damages as a counterclaim in a suit brought to collect the charges, do in court what they would have no lawful right to do out of court? It seems to me that the answer must be in the negative. There would be the same opportunity to evade the act in the one case as in the other, unless the courts should undertake in every case of that sort to supervise the transaction and ascertain whether or not there was any purpose to evade the act. This is a burden which I do not think the courts should assume, nor do I think that Con-

gress intended that they should assume it. The parties have no more right to do in court, and under the supervision of the Court, what they could not by agreement do outside of the court. The act of Congress was intended to be all-embracing and to remove every opportunity, as far as possible, on the part of the railroad to allow these claims to be offset.

"No one is deprived of any right by this construction of the statute. The railroad company is still at liberty in these cases to collect its freight. It is also at liberty, provided it treats the transaction separately and apart from any question of the freight charges, to agree with the shipper for a settlement of the claim for damages. So, likewise, the railroad company has the right to bring its suit for the recovery of its freight charges, and the shipper may bring his separate, independent suit for damages. But any effort to connect the two transactions and make the settlement of one in any way dependent upon the other is contrary to the purpose of the act. This may seem to be a harsh rule, perhaps a technical one, and at times to work inconvenience and hardship. But these matters, as I have said, must give way to the broader and greater purpose of Congress to prevent the greater evils of rebates and discrimination.

"I am constrained, therefore, to hold that the counterclaim cannot be interposed in this case, but relief must be sought by a separate, independent action and an appropriate order sustaining the demurrer will be duly entered."

In the cases to the contrary the argument is made that if the parties intend to evade the statute by an unlawful

compromise, they can do it just as easily in two actions as in one. In other words, the argument seems to be that because it may be possible, in a suit by a shipper to recover for loss of or damage to freight, for the parties to effect a collusive compromise; or, for that matter, without suit, it may be possible for a carrier to collude with a shipper and pay him a rebate disguised as a fictitious claim for loss and damage; therefore counterclaims and set-offs should be pleadable in this class of cases, apparently on the theory that the danger of rebating as a result of permitting such offsets to be pleaded is no greater than if this were not permitted. This possibility of collusion, even if set-offs and counterclaims are not permitted, seems to have impressed Judge Geiger in the *Tectonius* case; but if the argument were sound, then it would be equally sound in a situation such as that in *Chicago, Indianapolis and Louisville Ry. Co. v. U. S.*, 219 U. S. 486, *supra*. In such a case the parties conceivably might make a collusive arrangement under which the railroad would pay an exorbitant price for the advertising, and then the person furnishing the advertising could buy transportation at the regular rates. Moreover, since Congress has forbidden payment of the carrier's charges in anything other than money, it is immaterial that some possibility of abuse remains even if a shipper may not plead a counterclaim. There is no warrant for disregarding the mandate of Congress merely because every possible avenue of abuse has not been closed. As

a practical matter it is a deterrent to collusion between the shipper and carrier to forbid all such arrangements, whether to pay the carrier's charges in services, property, advertising, or the release of damage claims. This Court recognized this in the case last cited, the principle of which is equally applicable in the case at bar.

In *Battle v. Atkinson*, 9 Ga. App. 488, 71 S. E. 775, *supra*, the argument is made that a shipper who owed four hundred dollars in freight charges and who sued the carrier for loss and damage and recovered twelve hundred dollars and collected from the carrier in settlement of the judgment twelve one-hundred-dollar bills, might take four of those bills and pay the carrier its claim for freight charges, and would not thereby be doing anything contrary to the letter or spirit of the law; and, therefore, the Court argued, if the same shipper were sued by the carrier for those freight charges that shipper should be permitted to plead his claim as a set-off or counterclaim, as, if recovery were had, that would be merely a case of striking a balance between the parties and rendering a judgment that would finally end the controversies pending between the parties. If this argument were sound it would be applicable to the situation which this Court had before it in the case of *Chicago, Indianapolis and Louisville Ry. Co. v. U. S.*, 219 U. S. 486, *supra*. The conclusion of the *Georgia* case is plainly unsound under the decision of this Court in the case last cited. If the carrier should undertake to issue four hundred dollars worth of trans-

portation in payment of a perfectly valid claim against the carrier far exceeding that four hundred dollars, the issuance of such transportation would be plainly illegal, notwithstanding the fact that if the carrier paid the claimant twelve hundred dollars in cash in settlement of a valid claim for that amount, that claimant might then use four hundred dollars of that amount with which to purchase transportation.

The cases which sustain the right to set-off and counterclaim stress the alleged "inconvenience" of requiring the parties to resort to two lawsuits when, by allowing set-off and counterclaim, the whole dispute can be disposed of in one. This is an argument which should be addressed to Congress, not to the courts. The argument also ignores the fact that the right to set-off and counterclaim is wholly unknown to the common law (except to the limited extent that recoupment was permitted at common law).

The courts which permit counterclaims and set-offs to be pleaded in such cases emphasize this argument of convenience and attempt to minimize the danger of violation of the Hepburn Act or of possible rebating. Any rebate, however slight, is a violation of the law. The policy of the law is just as much opposed to a small rebate as a large one. Congress has prohibited *all* departures from the published tariffs—not all except minor departures. Congress has provided that a carrier may not in any case accept *any different compensation* from one patron than from another. The evils of rebating are not to be com-

promised with. There is no room, under the policy of Congress, for the application of any equitable considerations in particular individual cases of apparent hardship or inconvenience.

The policy of the law is so plain that the criminal sections of the law apply even where there has been no collusion and the carrier has not been a party to the arrangement whereby a particular shipper fraudulently obtains a favor from a carrier (*U. S. v. Koenig Coal Co.*, 270 U. S. 512). As a practical matter, where through a mistake an undercharge results, there is always some danger of discrimination and rebating even where there is no collusion. This is so because of the difficulty in many cases of enforcing the collection of small sums. If shippers can in such cases plead set-offs and counterclaims, the collection of undercharges will necessarily be seriously jeopardized and made far more difficult in all cases where it is necessary for a carrier to sue for an undercharge. Undercharges are usually small in amount and collection is difficult in many cases. Many shippers who would not file claims, or who would not bring suit on claims, will, when sued for undercharges, be permitted to plead counterclaims which have no merit, but which will have the practical effect of interfering with the collection of undercharges. This possibility, more important in most cases as a practical matter than the possibility of opening the door to collusive rebates, seems not to have been considered by any of the courts that have had occasion to consider the question, and

we respectfully urge its consideration herein, not in connection with the construction of the act itself, but in answer to the "argument of convenience" which has impressed some of the courts before whom the question has been presented. No "argument of convenience" can justify reading an exception into the plain, unambiguous language of the act, but, even if this were permissible, the true argument of convenience tends to the contrary conclusion.

In the Transportation Act of 1920 (U. S. Code, Title 49, Section 3, Subsection 2) it is provided:

> "From and after July 1, 1920, no carrier by railroad subject to the provisions of this act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination" (41 Stats. 479; U. S. Code, Title 49, Ch. 1, Sec. 3, Sub. 2).

Under this section it is mandatory for the carrier promptly to collect freight charges in all cases. No exception based on loss or damage to the shipment is made. Charges must be paid, and at once.

Pursuant to the authority given in this statute, the Interstate Commerce Commission has permitted short extensions of credit, in certain cases, where shippers file a bond for security, but even in such instances payment of charges must be kept upon what is substantially a cash basis (*In*

re Section 3 of the Interstate Commerce Act as amended by Section 405 of the Transportation Act of 1920, 57 I. C. C. 591). In no case is a delay in payment permitted beyond ninety-six hours. All charges are required by law to be paid within that time.

In view of this fact, the assertion by a shipper of the right to counterclaim for damages and so resist payment of his freight charges will necessarily prevent the prompt collection of such charges, notwithstanding the duty, under this statute, to pay at once. If the shipper fails to pay promptly, he has violated the law. If the courts are to allow him to counterclaim in judicial proceedings they will, in effect, be placing their stamp of approval upon a prior violation of the law, and will still further encourage such practices. All that will be necessary in any case for a shipper to compel the indefinite extension of credit by a carrier, notwithstanding the clear policy of Congress as expressed in this act, will be for the shipper to assert a counterclaim and thus indefinitely postpone the actual collection of the carrier's charges, even should the shipper not prevail on his counterclaim.

For the foregoing reasons, we submit that the question certified by the Circuit Court of Appeals should be answered "yes."

Respectfully,

SAMUEL H. CADY,
AARON M. SARGENT,
NELSON TROTTMAN,
Attorneys for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 193

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellant,

vs.

O. N. LINDELL,

Appellee.

ON CERTIFICATE OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Since the appellant's original brief herein was filed with the Clerk, the Circuit Court of Appeals for the Eighth Circuit decided the precise question here involved and entered an opinion, filed November 15th, 1929, in the case of *Fullerton Lumber Co.* v. *Chicago, M. St. P. & P. R. R. Co.,* (not yet reported), sustaining appellant's contention upon the question herein certified to this court. We quote the material portion of the opinion:—

> "On the question whether a counterclaim for damages for losses arising out of the shipment may be interposed in this kind of an action to collect freight charges there is conflict of federal decisions. It appears that the trial courts in this circuit confine the issues and the trial in the cases to the freight charges, and we think this con-

forms to the intent of congress reflected in the acts relating to interstate commerce. A paramount purpose of the regulation of carriers is to compel uniform treatment of shippers, and the exaction of the published freight charges in cash payment from each and all shippers alike is a necessary step. To that end carriers are compelled to sue where through mistake or otherwise an undercharge has been made or collection has failed, and such suits are often burdensome to the carriers and instituted with reluctance by them. If the suits are to afford occasion to litigate all the various claims shippers may make against carriers the whole intent and purpose of congress will be defeated. Instead of an aid to the uniform collection of the same cash charges from all shippers the suits would inevitably open the door to gross discriminations under the color of counterclaims and offsets which the courts could not prevent. In fact, a measure of discrimination is present as soon as a counterclaim is permitted in a carrier's suit for freight charges. Shippers who have rare dealings with carriers and no claims must submit to judgment as soon as their cases are reached and their debt for freight charges proved against them. Other shippers who have frequent dealings and claims may wait until issues are formulated upon their counterclaims or offsets and then they cannot be adjudged to pay their freight charges until all such matters of counterclaim and offset have also been litigated and determined. At the end of the litigation such shippers, if successful, will not be compelled like others to pay their freight charges in cash but their freight bills will practically be otherwise discharged. Discriminations and preferences have taken many forms in the past and the intention of congress to abolish them all is clear. The federal courts are also bound to the same purpose, and, as the practice of permitting counterclaims in these suits tends to defeat the purpose the practice should not be permitted even though there is a statute of the state sanctioning counterclaims generally in law actions."

In its opinion the Circuit Court of Appeals cites with approval the cases supporting appellant's contention, including the recent case of *Pennsylvania R. R. Co.* v. *So. Car. Produce Ass'n.*, 25 Fed. (2nd) 315; and cites with disapproval the decisions to the contrary.

Counsel have referred, at page 2 of their brief, to the fact that in this case "collection of transportation charges has not been made, *and cannot be made except through suit* * * *." (Italics are ours.) The carrier is not charged with any violation of duty in making delivery of the shipment without such collection. The reason why such collection cannot be made is because of the persistent refusal of appellee to comply with the provisions of the Transportation Act of 1920. (41 Stats. 479, U. S. Code, Title 49, Ch. 1, Sec. 3, Sub. 2.) Prompt payment of charges in all cases is required. Congress has made no exception to apply where a damage claim is asserted. Nor is it the function of the courts to create such exceptions. The correctness of this rule has been repeatedly announced by the decisions of this court, and was applied to the Hepburn Act in the case of *Louisville, etc. R. R. Co.* v. *Mottley*, 219 U. S. 467. The court there said (at page 474):—

> "It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a hardship upon the defendants in error. But that consideration cannot control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute. * * * That intention is to be gathered from the words of the act, interpreted according to their ordinary acceptation, and, when it becomes necessary to do so, in the light of the circumstances as they existed when the statute was passed. * * * The court cannot mold a statute simply to meet its views of justice in a particular case. Having, in the mode indicated, ascertained the will of the legislative department, the statute as enacted must be executed, unless found to be inconsistent with the supreme law of the land."

Appellee was under a duty to pay his freight charges within ninety-six hours of delivery of the shipment. This he has not done. On the contrary, a delay of four years and three months has already taken place.

Appellee has referred to the "red tape", and to a host of imaginary evils which he believes will be the result of

denying the shipper this right of counterclaim and setoff. This is a mere restatement of the argument of convenience referred to in some of the cases. If a shipper pays his freight at once (as we contend the law requires), there can be no occasion for setting off judgments. Extension of credit is not allowed at present (except under the regulations of the Commission). The shipper should pay his charges at once without raising a dispute upon any collateral issue. He is then free to assert whatever claim he may have for damage sustained to the shipment. He has a remedy under the Carmack Amendment (34 Stats, 594, U. S. Code, Title 49, Ch. 1, sec. 2, sub. 11) which permits him to sue either the inital or the terminal carrier and obtain full compensation for his loss. Any question of hardship is disposed of by this court's opinion in the *Mottley* case, *supra*. The suggestion of hardship, and the argument of convenience are both beside the point and must yield to the policy of Congress.

Respectfully submitted,

SAMUEL H. CADY,
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Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 193

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,

Appellant,

vs.

O. N. LINDELL,

Appellee.

On Certificate of the Circuit Court of Appeals for the Ninth Circuit

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

THE QUESTION CERTIFIED

There has been certified to this Court under section 239 of the Judicial Code, the question:

> "Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful charges and thereafter brings an action at law to recover from the shipper the amount thereof, in a United States court in a district where the state law provides that if a defendant omits to set up a counterclaim arising out

> of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same, and, further, that where such cross-claims have existed 'the two demands shall be deemed compensated,' is the shipper, acting in good faith and without collusion, debarred by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587) from pleading, by way of setoff, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment?"

That question is not whether a carrier must, or must not, collect transportation charges *only in money*; nor whether the shipper may or may not collect damages *only in money;* or, stated differently, whether the shipper is or is not entitled to urge a claim for damages *in payment* of tariff charges due upon an interstate shipment.

The question, in brief, is, where collection of transportation charges has not been made, and cannot be made except through suit, and where damages to the shipper, arising out of the same transaction, have not been recovered, and cannot be recovered except through suit, may the respective claims be adjudicated in one action, or must there be two separate suits, resulting in two separate judgments, and then (as will hereinafter be mentioned), but not until then, on motion made in one case or the other, one judgment be offset against the other judgment.

The appellant states (page 5 of Brief) "Under the Hepburn Act a carrier must collect its charges only in money. It may not collect a greater or less or different compensation than the rates, etc., specified in its tariffs. A carrier may not accept a release of damages in payment of transportation charges." This is not disputed by the appellee, nor does the appellee claim for anything other than a reasonable and practicable interpretation or construction of the Transportation Act.

The facts in this case, as certified, are that the carrier *did not* collect its transportation charges; the shipper *did not* collect his damages, nor the carrier pay same. The carrier brought suit to recover such charges, and in and by that suit it sought to obtain a money judgment against the shipper. The shipper, by his counterclaim, in effect sought to recover a money judgment against the carrier for loss suffered by the shipper as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment.

An illustration may be made as follows: A purchases grapes from B but neglects to make payment. When suit is brought by B for the purchase price of the grapes, A claims that there is a sum owing to him for grain which he sold to B, and a counterclaim to B's demand is interposed by A. In such case the appellant would say that A is urging the right to pay

for the grapes with grain, and not with money. Such assertion is incorrect or misleading. The real situation is that, if an amicable settlement is made out of Court, there is, theoretically, a payment made by A to B for the grapes, and at the same time, or at a different time, there is a payment made by B to A for the grain. It may be that all that will be accomplished at one conference of those parties, at which they may go through the unnecessary, if not ridiculous, formality of A paying his debt to B by passing the entire amount in money over the table, and thereupon the whole, or a part of the same money is passed back by B in payment of his debt to A. If the matter is brought before the Court, there is no thought of paying for one commodity with another commodity. But in determining the rights of the parties, the Court ascertains the amount owing by each to the other, and, since the Court is called upon to collect an amount from each party, it does so in one action, and, in making such collection it avoids circuity and declares as a setoff from the one, the amount of the other.

Of course, if it be true that whenever a carrier is a party to a lawsuit, it is to be given special privileges, or if it be the policy of the law that it shall be made as difficult as possible for a shipper to obtain what may be justly due him by way of damages from the carrier, having in mind that if the shipper is thus made to realize that he must spend much more in prosecuting his claim against the carrier than he will re-

cover at the end of the litigation, he may decide to bear his loss in silence, then it may follow that in no such case can the shipper maintain a counterclaim, but otherwise, we claim that such may be done; that the law permits and requires such procedure, and that same is not forbidden by the Interstate Commerce Acts.

The appellant (page 6 of Brief) says: "The possibility of collusion is not the only reason for denying shippers this right. Collusion is not necessary to sustain a prosecution for rebating. If shippers may plead counter-claims, the difficulty of collecting undercharges will be greatly increased, especially where amounts are small; and as a practical matter the policy of the law will be defeated, even if there is no collusion," and appellant (page 17) quotes from the opinion of Judge Wade in the Hoopes case (233 Fed. 135, at p. 136) to the same effect:

> "Very often the suits are for small amounts, and if the shipper can, by counterclaim, acquire jurisdiction of the carrier in an action for damages to freight, he can force the carrier to spend much more in prosecuting its action for freight charges than the freight charges amount to."

We cannot subscribe to any such view, but, on the contrary, we contend that each party, carrier and shipper, has rights which the law and the procedure of the Courts should respect and enforce and that in so far as may be consistent with law and equity, the carrier should not *force the shipper to spend much more in*

prosecuting his action for damages than the sum claimed, or that is recoverable, amounts to.

We copy from Central Appalachian Co. v. Buchanan, 90 Fed. 454, 462, the following:

> "It was observed by the master of the rolls in Jeffs v. Wood, 2 P. Wms. 129, that:
> 'It is against conscience that A should be demanding a debt against B, to whom he is indebted in a larger sum, and would avoid paying'; and that "in these cases equity will take hold of a very slight thing to do both parties right."

> In Carr v. Hamilton, 129 U. S. 255, 9 Sup. Ct. 295, Justice Bradley said that:
> 'Natural justice in equity would seem to dictate that the demands of parties mutually indebted should be set off against each other, and that the balance only should be considered as due.' "

PRACTICE AND PROCEDURE REQUIRED OR PERMITTED BY STATE AND FEDERAL LAWS

Section 914 of the Revised Statutes (U. S. Code, Title 28, Sec. 724) provides that:

> "The practice, pleadings, and forms and modes of proceeding in civil causes * * * in the district courts, shall conform, as near as may be to the practice pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

The practice and modes of procedure for like causes in the courts of record in the State of California are outlined as follows:

C. C. P., Sec. 437. "The answer of the defendant shall contain: * * *

2. A statement of any new matter constituting a defense of counterclaim."

C. C. P., Sec. 438 (as enacted in 1872): "The counterclaim mentioned in the last section (section four hundred and thirty-seven) must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action.

As amended in 1927:

"The counterclaim mentioned in Section 437 must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action."

C. C. P., Sec. 439:

"If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

C. C. P., Sec. 440:

"When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

23 Cal. Jur., p. 241, Sec. 17:

"If the transaction out of which an action on contract arises has involved a tort on the part of plaintiff, the defendant may counterclaim damages on that account."

Parish v. Studebaker, 50 Cal. App. 719, 723:

"The trespass found to have been committed by the plaintiff against the defendants was, of course, a tort, but we think that it was such a tort as would be connected with the subject of the action, as defined in subdivision 1 of the section quoted. It must be admitted that separate torts cannot be set up in complaint and counterclaim. (Wigmore v. Buell, 116 Cal. 94; 47 Pac. 927). The court has never decided, however, that torts may not be set up one against the other, so long as they fall within the code classification as being connected with the subject of the action or arising out of the transaction set forth in the complaint * * * *. Here a claim for damages was made for a tortious withholding of the property, and we are of the opinion that the trespass alleged to have been committed by the plaintiff may be properly set up in favor of the defendants by counterclaim as being a cause of action connected with the transaction alleged by the plaintiff."

2. Hutchinson on Carriers, (3 Ed.) Sec. 799:

> * * * "The party liable for the freight, however, when sued, may set up, in answer to the claim, any breach by the carrier of his contract and will be allowed to set up any loss or damage to the goods for which he is liable or sustained by him in consequence of unreasonable delay in their carriage or delivery."

Said Judge Bledsoe in the District Court of the Southern District of California in Payne, Director General of Railroads v. Clarke, 271 Fed. 525:

> "The pleading of the counterclaim herein is in accordance with the established practice in California, Section 438, Code of Civil Procedure, and as a matter of fact, if defendant has a claim and does not plead it herein, there is grave doubt if under California practice he would not be denied the opportunity of asserting it hereafter in any form. California Code of Civil Procedure, Sec. 439."

In Pennsylvania R. Co. v. Bellinger, 166 N. Y. S. 652, the Court said:

> "There is no provision in our Code which restricts the right to plead such a cause of action as a counterclaim, because of the theoretical objection set forth in the above mentioned federal cases. The practice of this court in relation to the allowance of a counterclaim must be governed by the Code of Civil Procedure, and under that Code the counterclaims here in question are allowable, Section 501."

The North Chicago Rolling Mill Company vs. The St. Louis Ore and Steel Company, 152 U. S. 596, 88 L. Ed. 565, 572:

"The adjustment of demands by counterclaim or setoff rather than by independent suit is favored and encouraged by the law, to avoid circuity of action and injustice. Florida R. Co. v. Smith, 88 U. S. 21 Wall. 255, 22 L. Ed. 513."

See also Partridge v. Phoenix Mut. L. Ins. Co., 15 Wall. 573, 21 L. Ed. 229.

But appellant claims that all such is forbidden by the following provision of the Hepburn Act: * * * "nor shall any carrier charge, demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person or privileges or facilities in the transportation of passengers or property, except as are specified in such tariffs."

However, under the Carmack Amendment to the Interstate Commerce Act (34 Stats. 594, Title 49 U. S. Code, Chapter 1, Section 20, Subd. 11) in requiring that the carrier on receiving property for transportation shall issue a receipt or bill of lading therefor, it is also provided that the carrier, "shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused to it by any common carrier,

railroad, or transportation company to whom such property may be delivered or over whose line or lines such property may pass within the United States, or within an adjacent foreign country when transported on a through bill of lading."

Thus it appears that where the shipper fails, neglects or refuses to pay, the carrier may bring suit and recover a judgment payable in money. Also the shipper may maintain a suit for damages against the carrier and may recover a judgment payable in money.

Perhaps on process issued on the judgment against the carrier a collection in money can be had. Perhaps on process issued on the judgment against the shipper, a collection in money can be had, and perhaps not, as he may have become insolvent or have no available property upon which a levy of execution may be made.

In such case, is the law so inflexible, or the procedure so impotent, that the carrier must pay in money the judgment against it, and be unable to collect anything whatsoever on its judgment against the shipper?

Possibly the red-tape by which it is claimed that the parties are bound through the acts of Congress may be unwound through the marshal proceeding to collect the judgment in money from the carrier for the shipper, and then proceed to collect back from the ship-

per the money for the carrier. But such procedure is neither businesslike nor practicable.

However, it undoubtedly is true that where A has recovered a judgment against B, and in the same or another forum, B has recovered a judgment against A, the proceedure, whether taken in law or in equity, will allow one judgment as an offset to the other. Said the Supreme Court of California in the case of Haskins v. Jordan, 123 Cal. 157, 160:

> "The power to set off one judgment against another exists independent of statute, and rests upon the general jurisdiction of courts over their suitors and processes. (Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76). The regularity of such a proceeding was recognized in Jones v. Chalfant, 55 Cal. 505, and to the same proposition may be cited Freeman on Judgments, 4th Ed., Sec. 467 et seq.; 22 Am. & Eng. Ency. of Law, 445; Chandler v. Drew, 6 N. H. 469; 26 Am. Dec. 704. While the right to adjust the conflicting claims of its suitors in the mode indicated was originally exercised only by equity as an incident to its powers, courts of law later came to adopt the same procedure, and in this state, where in the same forum the litigant is entitled to such relief, legal or equitable, as his showing justifies, the particular distinction between the powers of courts of equity in this regard and courts of law ceases to be important. In every case the suitor has the right to ask for the setoff, and in every proper case as of right the motion should be granted."

Since such may be done, it would seem to be a remarkable condition of affairs where if, on the one

hand the shipper fails to pay, the carrier must bring a separate suit against the shipper to recover a judgment against him, and if on the other hand, the carrier refuses to settle for the damages done to the shipment, the shipper must bring a separate suit against the carrier to recover a judgment for the amount of the damages suffered, the parties may thereafter go through the maneuvers of a proceeding by motion or otherwise in the one court to have one judgment to the amount thereof set off against the other judgment. Just how the law requiring the transportation charges to be collected *only in money* would be observed and complied with by the circuity of action in such case, any more than would be done directly in a case where the shipper was permitted to interpose a counterclaim in a case such as is now before the court, is not clear.

However, the mistake is in stating over and over again a proposition which, as so stated, is incorrect. Thus the appellant (page 15 of brief) referring to the decision in the Tectonius case says that the effect of which was "to bring about in court the payment of the carrier's charges in something else than money," and again: "Upon sound principle, the rule that a carrier's charges must be paid only in money extends to the assertion in court of the right *to pay* such charges by offsetting a counterclaim against them." And again on page 16, "that out of court shippers may not *pay* their freight charges *with damage claims.*"

All such, of course, is illogical and misleading. By interposing a counterclaim for damages in a suit for transportation charges the shipper is not attempting to pay those charges by a claim for damages, nor in a suit brought by the shipper would the carrier be paying a claim for damages by setting up in its answer a claim for an unpaid freight bill. Each party seeks the aid of the court in establishing and aiding in the collection of the amount which such party is entitled to receive from the other, and when one party has instituted a suit, then instead of the bringing of another and different suit, the controversy is disposed of by the court rendering a decision specifying the amount allowable on plaintiff's complaint, and also the amount allowable on defendant's counterclaim. In such case, if form is of more importance than substance, or, theoretically, if necessary, for the purpose of bookkeeping, the defendant may pay in full the amount allowed on the complaint, and the plaintiff immediately hand back the amount allowed on the counterclaim. But the practical effect is the application of setoff or recoupment.

THE DECISIONS OF THE DISTRICT COURTS AND OF STATE COURTS

The title of the various decisions rendered in the District Courts and by the State Court, have been set forth in the certificate of the Circuit Court of Appeals

filed herein, and are discussed in Appellant's brief. As those cases will be read, and the reasons given therein for the opinions there expressed will be duly considered it will serve no useful purpose for the appellee to quote therefrom at length. However, from the viewpoint of appellee the entire matter has been so clearly and correctly stated by Mr. Justice Powell of the Court of Appeals of the State of Georgia, in the case of Battle v. Atkinson, 71 S. E. 775, that we quote at length from the opinion as follows:

> "Is there anything in the act of Congress, commonly known as the 'Hepburn Act,' which would prevent a court from allowing the defendant to take advantage of this right of recoupment as against the carrier's suit to recover charges upon a shipment?" And in answer to this inquiry the Court said: "Under the act of Congress and the decisions that have been made in reference thereto relating to the carrier's charges for interstate shipments, it is now settled beyond controversy that no device or arrangement of any kind is permissible by which the carrier can accept anything but money in payment of freight charges, and that the sum so charged must be the published rate applicable to all persons alike and subject to no rebate for any cause whatever. The act of June 29, 1906, amending the previous law, prohibited the carrier from charging, collecting, or receiving from any person or persons, not only a 'greater or less compensation' for any services to be rendered than is charged, collected, or received from all other persons for like services, but also from charging collecting, or receiving 'different compensation'; and to require one person to pay in money and to allow another person to pay in commodities or in promises, or in any other way than

in money violates this prohibition. L. & N. R. Co. vs. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297; Chicago Ry. Co. v. United States, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. 305 * * *." "If the carrier has completed transportation and has collected the usual charges from the shipper, but has damaged the goods or has allowed them to become damaged by causes for which it is liable, the shipper has a right of action against the carrier for the damage, and these damages are payable in money, just as the carrier's claim for transportation charges is payable in money. The United States Supreme Court referred to this principle (that the carrier must pay as well as be paid only in money) in the Mottley Case, supra, saying, 'The passenger has no right to buy tickets with services, advertising, releases, or property, nor can the railroad company buy services, advertising, releases or property with transportation.'

Here we have a case where the carrier did not receive cash for the transportation, and where it did not pay cash in settlement for the damages it had done to the shipment; and it brings its action against the shipper, asking the court to lend the aid of its processes for the collecting of the money due for the freight charges, and the defendant merely asks the court, while it has both parties thus before it, also to collect for him the money due by the carrier for its delinquency in executing the same contract. The amount due to the one party is liquidated, and the amount due to the other is unliquidated; but the court has the means and the power to liquidate the latter claim, and to place it upon the same footing as the former. The very object of allowing pleas of recoupment and setoff and all similar pleas is to prevent a multiplicity of suits, and to enable the

court, when it has all the necessary parties before it, to adjudge all their respective rights, and to render a judgment which will finally end the controversies pending between them. Now, if the shipper had sued the carrier in a separate action and had recovered judgment, say for the $1,200 he alleged to be the amount of the damage done to the shipment, and the carrier had paid over to him twelve $100 bills, there would certainly be nothing in the spirit or the letter of the act of Congress to prevent the shipper from taking four of these bills and paying to the carrier its claim for the freight charges. The effect of the plea in the present case is simply a prayer on the defendant's part that he be allowed to consummate this same end through the offices of the court, which the plaintiff has first invoked. It is true that the court, in rendering its judgment, will dispense with the necessity of the plaintiff's paying over the full amount of the damages, and of requiring the defendant to hand back the amount due the plaintiff, and will strike a balance, and will merely render a judgment requiring the losing party to pay the difference; but it is not with mere incidentals such as these that the act of Congress deals, or which it was intended to prohibit. It is the substance of the thing at which the act of Congress aims, and the form which the transaction assumes is immaterial. No matter how plausible or ingenious may be the form of the transaction, if the spirit or the letter of the act is violated, the transaction is illegal. And, on the other hand, any form may be adopted which does not violate the letter or the spirit of the law; and for the court to proceed to adjust the respective rights of the parties in a transaction such as this is in no sense a device for the remitting or the refunding of any portion of the rates and charges with which the act of Congress deals."

Finally, the appellant (page 25), referring to the section of the Transportation Act of 1920 as contained in U. S. Code, Title 49, Sec. 3, Subd. 2, says, that "Under this section it is mandatory for the carrier promptly to collect freight charges in all cases. No exception based on loss or damage to the shipment is made. Charges must be paid at once."

Also on page 26, "All that will be necessary in any case for a shipper to compel the indefinite extension of credit by a carrier, notwithstanding the clear policy of Congress as expressed in the act, will be for the shipper to assert a counterclaim and thus indefinitely postpone the actual collection of the carrier's charges, even should the shipper not prevail on his counterclaim."

But under the facts on which the question before the court is propounded, and notwithstanding the mandatory provisions of the Transportation Act, and although there elapsed the period of time from October 17, 1925, to May 7, 1928, the plaintiff's claim for freight was not paid; neither was there paid the defendant's claim for damages.

On May 7, 1928, suit was brought by the carrier for the purpose of collecting its freight charges. Can the shipper in the same action collect its damages resulting from the carrier's negligence in handling that shipment, or must there be further delay to the shipper and another and separate suit brought by him?

Of course, if the freight bill, though small in amount, cannot be collected without suit, there will be costs incurred in such collection, but if the carrier unjustly refuses to pay for damages caused to a shipment through its negligence, then, though the amount of the damages is not large, the shipper must either incur expense in a suit brought to recover the amount or lose same altogether; and it may be that, in some instance, the carrier will, in bad faith, refuse to pay the small claim, having in view the fact that the shipper cannot afford the cost and delay of litigation.

This has been expressed by District Judge Mayer in the case of Wells Fargo & Co. vs. Cuneo, 241 Fed. 727, as follows:

> "So that really what the contention comes down to is that the shipper would be deprived of his rights; for, if the right to counterclaim for damages is denied to him, I cannot appreciate any theory on which he could be permitted to assert precisely the same claim for damages in an independent lawsuit. Indeed, such a construction as plaintiff here urges would give to carriers, under some circumstances, an undue advantage, and might readily work an injustice upon shippers and consignees never contemplated by the statute."

It would also seem that the withholding by one party of the amount to which the other party is justly entitled, is as reprehensible in the one case as the other.

The principles of equality as established by the Hep-

burn Act should extend to each phase of the Interstate Commerce Law and both the carrier and the shipper should have the same rights and privileges as to the procedure, the one with the other, when they resort to the courts for redress of grievances, and the rules of procedure for them should be the same as for other litigants.

The appellee claims that there is no conflict nor inconsistency between Section 914 of the Revised Statutes of the United States, the several sections of the Code of Civil Procedure of the State of California, and the various provisions of the Interstate Commerce Acts, and that upon due consideration of all the laws applicable thereto, it should be held that when sued by a carrier for its transportation charges, a shipper may plead a counterclaim for loss or damage to the identical shipment.

Appellee therefore asserts that the question certified by the Circuit Court of Appeals should be answered "No."

Respectfully submitted,

F. DeJOURNEL,

Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 193.—October Term, 1929.

Chicago & Northwestern Railway Company, a Corporation, *vs.* O. N. Lindell.	On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[February 24, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

October 17, 1925, appellee delivered to the railroad of the Southern Pacific Company at Kingsburg, California, a shipment of grapes for transportation to Chicago for delivery to a named consignee. The appellant received the car at Omaha, hauled it to Chicago and there delivered it to the consignee without collecting the freight and other charges which amounted to $683.79. Because of unreasonable delay on the part of appellant and its failure to use reasonable care to keep the car properly iced, the grapes were delivered in a damaged condition. Appellant sued in the United States District Court for the Southern District of California to recover such charges. And appellee by answer set up the loss. While claiming to have suffered damages of $1,011.70, he asked no affirmative relief but only that the loss be held to be a setoff against appellant's claim. The court allowed the setoff.

The Circuit Court of Appeals, under § 239 of the Judicial Code, 28 U. S. C., § 346, certified to this court the following question:

"Where an interstate railroad carrier delivers to the consignee at destination a consignment of freight without collecting the transportation and other lawful charges and thereafter brings an action at law to recover from the shipper the amount thereof, in a United States court in a district where the state law provides that if a defendant omits to set up a counterclaim arising out of the transaction constituting the foundation of the plaintiff's claim he cannot thereafter maintain an action upon the same, and, further, that where such cross-claims have existed 'the two demands shall be

deemed compensated,' is the shipper, acting in good faith and without collusion, debarred by the Interstate Commerce Acts, particularly the Hepburn Act (34 Stat. 587) from pleading, by way of setoff, a counterclaim for a loss suffered by him as a result of the carrier's failure to perform its obligations touching the transportation and delivery of the identical shipment?"*

The appellant is liable to the appellee for damages in an amount at least equal to the charges sued for. 49 U. S. C., § 20 (11). And unless the Hepburn Act stands in the way, the shipper has the right, under established practice in California, to set up his loss as a counterclaim. 28 U. S. C., § 724. California Code of Civil Procedure, §§ 437, 438, 439, 440. *Payne* v. *Clarke*, 271 Fed. 525.

The provision follows: ". . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, . . . than the rates, fares, and charges which are specified in the tariff . . .; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 49 U. S. C., § 6 (7).

The purpose of the Act to prevent discrimination has been emphasized by this court and is well-known. Since its enactment carriers may not accept services, advertising, property or a release of claim for damages in payment for transportation. They are required to collect the established rates, charges and fares from all

*There are conflicting decisions on the question. The following support an answer in the affirmative: Fullerton Lumber Co. *v.* Chicago, M., St. P. & P. R. Co., 36 F. (2d) 180; Illinois Central R. Co. *v.* Hoopes, 233 Fed. 135; C. & N. W. Ry. Co. *v.* Stein Co., 233 Fed. 716; Johnson-Brown Co. *v.* Railroad, 239 Fed. 590; Pennsylvania R. Co. *v.* South Carolina Produce Ass'n, 25 F. (2d) 315; D., L. & W. R. R. Co. *v.* Nuhs Co., 93 N. J. Law 309, 111 Atl. 223; Adams Express Co. *v.* Albright Bros., 75 Pa. Super. Ct. 410.

And the following in the negative: Wells Fargo & Co. *v.* Cuneo, 241 Fed. 727; C. & N. W. Ry. Co. *v.* Tecktonius Mfg. Co., 262 Fed. 715; Payne *v.* Clarke 271 Fed. 525; C. M. & St. P. Ry. Co. *v.* Pioneer Grain Corp., 26 F. (2d) 90; Battle *v.* Atkinson, 9 Ga. App. 488; Central of Georgia Ry. Co. *v.* Birmingham Sand & Brick Co., 9 Ala. App. 419; Nashville, C. & St. L. Ry. *v.* Tennessee Mill Co., 143 Tenn. 237; Penn. R. Co. *v.* Bellinger, 101 Misc. Rep. 105; N. Y. Cent. R. Co. *v.* Federal Sugar Co., 201 App. Div. 467.

alike in cash. *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467. *Chi., Ind. & L. Ry. Co.* v. *United States,* 219 U. S. 486. *Lake & Export Coal Corp.* v. *Chesapeake & Ohio Ry. Co.,* 1 F. (2d) 968. *State* v. *Union Pacific R. R. Co.,* 87 Nebr. 29.

The adjustment of defendant's demand by counterclaim in plaintiff's action rather than by independent suit is favored and encouraged by the law. That practice serves to avoid circuity of action, inconvenience, expense, consumption of the courts' time and injustice. *Rolling Mill Co.* v. *Ore and Steel Co.,* 152 U. S. 596, 615, 616. *Railroad Company* v. *Smith,* 21 Wall. 255, 261. *Partridge* v. *The Insurance Company,* 15 Wall. 573, 579. In the case last mentioned the court, speaking through Mr. Justice Miller, said (p. 580): "It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counter claims to be interposed and tried in the same suit and in the same form."

The practice of determining claims of shippers for loss or damage in suits brought by carriers to collect transportation charges is not repugnant to the rule prohibiting the payment of such charges otherwise than in money. The adjudication in one suit of the respective claims of plaintiff and defendant is the practical equivalent of charging a judgment obtained in one action against that secured in another. Neither is to be distinguished from payment in money.

It is well understood that payment by carriers to shippers under the guise of settling claims for loss and damage may in effect constitute discrimination that the Act was intended to prevent. But it is not suggested how opportunity for collusion in respect of such matters would be lessened by abolishing counterclaims in cases such as this. Collusion and fraud may be practiced in the defense and settlement of separate actions brought on such claims as well as when the same matters are put forward as offsets or counterclaims.

The Act ought not to be construed to put aside state laws and long established practice in respect of pleading unless the intention of Congress so to do is plain. There appears no reasonable probability that the relegation of shippers to separate actions for the enforcement of their claims for loss or damage would operate

more effectively to enforce the purpose of Congress to prevent discrimination. There is no substantial ground upon which the Act may be given the construction for which the carrier contends.

The question is answered

No.

A true copy.

Test:

Clerk, Supreme Court, U. S.